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In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

NASHAUN B. QUICK,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause of the Sixth Amendment permits the admission at a defendant's trial of a genuinely self-inculpatory confession of a non-testifying codefendant which also implicates the defendant.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully asks this Court to issue a writ of *certiorari* to the Appellate Court of Illinois, Third Judicial District, to review that court's judgment reversing Respondent's conviction for murder and remanding the case for a new trial, following the Illinois Appellate Court's determination that Respondent's Sixth Amendment right to confront witnesses was violated by the admission of a nontestifying codefendant's statement which inculpated Respondent.

OPINION BELOW

The initial ruling of the Appellate Court of Illinois, Third Judicial District, was an unpublished order issued pursuant to Illinois Supreme Court Rule 23. (See Appendix A). The Rule 23 order was later withdrawn upon the grant of rehearing, and the Illinois Appellate Court subsequently issued a published opinion, which is reported at 308 Ill.App.3d 474, 720 N.E.2d 1137, 242 Ill.Dec. 182 (3rd Dist. 1999). (See Appendix B)

JURISDICTION

The Illinois Supreme Court denied the State's Petition for Leave to Appeal on April 5, 2000. (See Appendix C). No petition for rehearing was filed by Petitioner.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). This petition for writ of *certiorari* is filed within 90 days of the Illinois Supreme Court's denial of the Petitioner's Petition for Leave to Appeal. The decision of

the Illinois Appellate Court was premised upon federal constitutional grounds and does not rest upon independent state grounds, albeit that a state residual hearsay statute was involved.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

725 ILCS 5/115-10.2, provides that:

> Admissibility of prior statements when witness refused to testify despite a court order to testify
>
> § 115-10.2. Admissibility of prior statements when witness refused to testify despite a court order to testify.
>
> (a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:
>
> (1) the statement is offered as evidence of a material fact; and
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

STATEMENT OF THE CASE

Respondent, Nashaun B. Quick, was charged with two counts of first degree murder and aggravated discharge of a firearm. (C. 2-4) In addition, two codefendants, Derrick Rhoden and Jeremiah Jamison, also were charged in

the murder of Paul Foster. (R. 3-11). On September 25, 1997, the State of Illinois filed two applications for the grant of use immunity, in order for the State to call Rhoden and Jamison as witnesses in the State's case-in-chief against Respondent. (C. 58-63). On November 24, 1997, the State filed two additional motions, requesting the entry of an order pursuant to 725 ILCS 5/106-2.5 giving Rhoden and Jamison use immunity and ordering them to answer all questions put to them by the prosecutor. (C. 93-94). On December 1, 1997, the motions were allowed. (C. 102-03).

After receiving the grants of use immunity, the codefendants were called by the prosecution to testify at Respondent's trial. (Jamison-R. 356; Rhoden-R. 392). Initially, codefendant Jamison refused to testify, asserting his fifth amendment right not to testify. (Jamison-R. 356-72). As a result, a hearing was held to determine the applicability of 725 ILCS 5/115-10.2 and whether Jamison's statement was substantively admissible against Respondent. (R. 373-87). The trial judge held in abeyance his ruling with respect to the admissibility of Jamison's taped statement pending the opportunity for codefendant Rhoden to testify. (R. 388-89). Rhoden was called, but he too refused to testify, asserting his fifth amendment rights. (R. 392-405). The trial judge again broached the issue of the admissibility of the codefendants' statements under section 5/115-10.2 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-10.2) (R. 438-70), ruling that both statements were admissible. (R. 456-70).

Prior to the resumption of Respondent's trial, Jamison changed his mind, and agreed to testify. (R. 477-78). Jamison took the stand, testified (R. 479-94), and was

subjected to cross-examination by Respondent. (R. 494-509). Codefendant Rhoden remained steadfast in his refusal to testify at Respondent's trial. Initially, the trial judge decided that he would not allow the State to elicit Rhoden's statement since codefendant Jamison had testified to much of what was contained in Rhoden's statement. However, after the State filed a motion for reconsideration, (C. 107-17), the trial judge allowed the State to admit into evidence only those portions of Rhoden's statement pertaining to the type of gun used, the number of shots fired, and the manner in which the shots were fired. (R. 571 et seq.). Those parts of Rhoden's statement were admitted through the testimony of Detective Sullivan. Additionally, Rhoden's assertion identifying Respondent as the shooter also was admitted. (R. 579-84).

The case went to the jury on December 18, 1997. The jury found Respondent guilty of murder (C. 165) as charged in count II, felony murder [720 ILCS 5/9-1(a)(3)] (C. 3). Respondent's post-trial motion (C. 219-72) was denied. (R. 275-332). A sentencing hearing was held on May 8, 1998, resulting in the imposition of a sentence of natural life imprisonment on Respondent. (R. 1176). Respondent filed a timely notice of appeal. (C. 353).

One of the issues raised by Respondent on appeal concerned the propriety of admitting certain portions of the non-testifying codefendant's (Rhoden's) confession at Respondent's trial for murder, arguing that he was denied his right of confrontation as guaranteed by the Sixth Amendment. In affirming Respondent's conviction in an unpublished order, the Illinois Appellate Court rejected Respondent's argument, finding that Rhoden's statement demonstrated sufficient guarantees of trustworthiness,

thereby making it admissible under the State's residual hearsay statute. (App. A at 5-6). However, Respondent filed a petition for rehearing, arguing, *inter alia*, that under this Court's decision in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), the non-testifying codefendant's confession lacked sufficient guarantees of trustworthiness to be admissible, violated Respondent's constitutional right to confront witnesses against him, and required that Respondent's conviction be reversed and remanded for a new trial. In granting Respondent's petition for rehearing, the Illinois Appellate Court determined that under *Lilly* codefendant Rhoden's confession was erroneously admitted because it lacked the necessary indicia of trustworthiness needed to support its admission at Respondent's trial without providing Respondent an opportunity for cross-examination. (App. B at 20-27). The Illinois Appellate Court also decided that the error was not harmless. (App. B at 27-28). The Illinois Appellate Court reversed Respondent's conviction, and remanded the case for a new trial. (App. B at 28). The Petitioner herein then sought leave to appeal the judgment of the Illinois Appellate Court to the Illinois Supreme Court, which was denied. (App. C).

REASON FOR GRANTING THE WRIT

The non-testifying codefendant's (Rhoden's) genuinely self-inculpatory confession, which evidenced the necessary guarantees of trustworthiness, satisfied the Sixth Amendment Confrontation Clause requirement that to be admissible the hearsay statement need exhibit sufficient indicia of reliability and was properly admitted at Respondent's trial.

Under what, if any, circumstances is a non-testifying codefendant's confession admissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution? As early as *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934 (1965), this Court held that it was error under the Sixth Amendment to admit the confession of a non-testifying codefendant under the guise of cross-examination. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 1623, 20 L.Ed.2d 476 (1968) followed, in which this Court ruled that Bruton was denied his constitutional right of confrontation when a codefendant's confession was admitted at a joint trial without the codefendant ever testifying. Of course, both of these Confrontation Clause decisions were grounded upon the general repugnance to the use of hearsay to obtain a criminal conviction. *Douglas*, 85 S.Ct. at 1077; *Bruton*, 88 S.Ct. at 1623, n. 3. Notwithstanding, Mr. Justice White in dissent in *Bruton*, cautioned against what he perceived as an "excessively rigid rule" whereby all confessions of non-testifying codefendants would be inadmissible *per se*. *Bruton*, White, J., dissenting, 88 S.Ct. at 1629.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), drawing upon prior Confrontation Clause precedents, this Court formulated the following general rule, attempting to reconcile the hearsay rule and the Confrontation Clause:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of relia-

> bility." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 100 S.Ct. at 2539.

By its ruling, this Court expressed its rejection of a *per se* ban on the admission of all hearsay at trial, a position which this Court readily has reasserted in subsequent cases. *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987); *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 3164, 111 L.Ed.2d 666 (1990); *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 3150-51, 111 L.Ed.2d 638 (1990). It is the administration of this general principle, as articulated in *Roberts*, which forms the core of the issue presented in Petitioner's instant petition.

The issue presented to this court centers on divining what circumstances would allow a non-testifying codefendant's confession to be directly admissible against a defendant at defendant's trial: what are the specific indicia of reliability or specific guarantees of trustworthiness to which this Court has referred and which this Court would consider adequate under the Confrontation Clause to sanction the admission of the hearsay confession of a non-testifying codefendant at a defendant's trial? We know for certain what these "particularized guarantees of trustworthiness" are not. They are not interlocking facts rooted in defendant's own confession. (*Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514 (1986); *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 1718-19, 95 L.Ed.2d 162 (1987)). They are not the facts and circumstances which corroborate the details

in the non-testifying codefendant's confession. (*Idaho v. Wright*, 110 S.Ct. at 3150-51; *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 1900-01, 144 L.Ed.2d 117 (1999)). They are not the underlying circumstances indicative of the voluntariness of a codefendant's confession for Fifth Amendment purposes. (*Lee v. Illinois*, 106 S.Ct. at 2064). So then, what are the indicia of reliability or "particularized guarantees of trustworthiness" which would render a hearsay statement admissible?

This Court's most recent pronouncement in *Lilly v. Virginia*, *supra*, reiterated the following rule, derived from *Idaho v. Wright*, *supra*:

> To be admissible under the Confrontation Clause, . . . hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. 119 S.Ct. at 1901.

Exactly what does this mean? As noted, this Court has expressed what factors are not to be used to establish either an "indicia of reliability" or the "guarantees of trustworthiness." This Court has not articulated what these are. It appears that the above statement in *Lilly*, which was taken from *Wright*, specifies that the indicia of reliability are to be deduced from the hearsay evidence itself, implying that the circumstances surrounding the making of the hearsay statement are to be considered. Yet, *Lee* rejects an approach which looks to the voluntariness of the codefendant's statement. *Lee*, 106 S.Ct. at 2064. Thus, the above statement from *Lilly* can be interpreted only as providing that the Confrontation Clause of the Sixth Amendment permits the admission at a defendant's trial of a codefendant's genuinely self-incul-

patory statement which was obtained under circumstances which support its verity, that is, that the codefendant was particularly likely to be telling the truth when the statement was made. Based on this reading of the Confrontation Clause, codefendant Rhoden's genuinely self-inculpatory statement, which also implicated Respondent in the shooting death of Paul Foster, was properly admitted at the Respondent's trial.

The confession of the non-testifying codefendant Rhoden was admissible, contrary to the Illinois Appellate Court's opinion (App. B at 26-27), under the Confrontation Clause because it possessed the requisite sufficient guarantees of trustworthiness to make this statement admissible notwithstanding the lack of an opportunity for Respondent to cross-examine Rhoden. The independent aspects of codefendant's statement which provide the necessary "guarantees of trustworthiness" of that statement and which render Rhoden particularly worthy of belief are found in the totality of the circumstances surrounding the making of the statement by Rhoden. *Wright*, 110 S.Ct. at 3148-49.

Although Rhoden was in custody at the station prior to being questioned by police about Foster's murder, he was in custody on a totally unrelated matter, a Class A misdemeanor. (R. 858). The decision to question Rhoden about Foster's murder was not made because police believed that Rhoden was involved in the shooting or that he was a suspect. (R. 587, 593, 835, 927). The police viewed Rhoden at the time simply as someone from a rival street gang who could provide police with needed information on gang activity that had occurred between the Vice Lords and the Gangster Disciples the day prior

to the Foster shooting. (R. 588, 593, 835, 858, 927). The police already knew about the physical altercation between the Gangster Disciples and certain members of the Vice Lords which had occurred on June 9 and 10, 1997. (R. 258, 323, 325, 429, 831, 927). The police also knew about the gang turf wars being waged in the area, including the corner where the victim's home was located. (R. 293-97, 307). Prior to the questioning of Rhoden about the Foster murder, police already had questioned not only several members of the Gangster Disciples (C. 121-36, 250-56; R. 807, 818-19, 821-23, 825, 843, 857, 919-20, 923, 949), but also other individuals. (R. 807-12, 844-45, 856-57, 919, 933). It just so happened that Rhoden was the first Vice Lord whom police came across and had the chance to interview about the gang problems. (R. 858, 927). However, Rhoden was not a suspect in Foster's death at the time. (R. 587, 927).

The initial questioning of Rhoden focused on the events of June 9 and 10. (R. 586, 927-28). In fact, it was Rhoden's presence at the public housing project after this altercation on June 10 which led to his arrest and presence at the station. (R. 858, 927). The questioning of Rhoden was open-ended and not leading since police were trying to obtain as much information as possible. Rhoden was not under the influence of alcohol or drugs at that time. Rhoden provided a history of what had transpired which led to the eventual altercation on June 10, 1997. (C. 261). Rhoden told police that he believed that the police already had the shooters under arrest, Lewis and Davis. (R. 588).

After taking a break, police advised Rhoden of his *Miranda* rights, as the police believed Rhoden had some

direct knowledge about Foster's murder. (R. 584, 587, 858). After additional questioning about the events of the preceding day, Rhoden stated that he was not involved in the murder of Foster. (R. 589). Rhoden was then questioned about his whereabouts after the fight on June 10, 1997. After the police recapitulated the information which Rhoden had given police, Rhoden stood up and said, "It wasn't me by myself, don't make it like I did it by myself." (C. 261; R. 589-90). After some additional questioning, Rhoden gave police a self-inculpatory statement, admitting his involvement in the shooting incident which resulted in Foster's death. (C. 262). In the process of admitting his own guilt for the murder of Foster, Rhoden inculpated Respondent Quick and codefendant Jeremiah Jamison. (C. 263-70; R. 846). Rhoden's oral statement was followed with the taking of his taped statement. (C. 263-70). Rhoden had been questioned for about one hour and forty minutes when he admitted his involvement in the Foster incident. (R. 593-94, 859). No promises of any sort were made or given in exchange for Rhoden's statement (R. 583) albeit that the matter of Rhoden's cooperation was briefly broached. (R. 585-86). It does not appear that Rhoden envisioned any such favorable treatment, especially given his subsequent refusal to testify at Respondent's trial although given use immunity.

The totality of the circumstances surrounding Rhoden's confession to police reveals that Rhoden's truthfulness is so clear that the use of cross-examination would have been of marginal utility. *Wright*, 110 S.Ct. at 3149. Clearly, the statement given by Rhoden to police was a genuinely self-inculpatory admission of his involvement in the

shooting incident which left Foster dead. A reasonable person in Rhoden's position would not have made such a statement unless he believed it to be true, since Rhoden was fully implicating himself in the murder of Foster, making Respondent legally accountable for murder. *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 2436-37, 129 L.Ed.2d 476 (1994). Under *Wright*, 110 S.Ct. at 3150, additional reliability factors presented in this case include the fact that Rhoden provided a consistent account between his oral and taped statements as to how the events unfolded that resulted in Foster's death. Rhoden was not under any duress or mental incapacity at the time he confessed. In addition, Rhoden, Jamison, and Respondent all belonged to the same gang, thereby eliminating any motive Rhoden might be said to harbor, that is, to inculpate Respondent in the shooting of Foster because Respondent belonged to a rival gang. If anything, Rhoden's motive would have been to lead the police away from suspecting either him or his fellow gang members, Jamison or Respondent, which is exactly what Rhoden did at first.

It is also significant that no heavy-handedness on the part of the police is evident of record. The circumstances under which the encounter between police and Rhoden came about is indicative of the overall general reliability of codefendant's statement. More importantly, Rhoden's demeanor and comportment, which is objectively reviewable from his tape-recorded statement, decisively adds to the reliability and trustworthiness of his statement. It can be discerned from his taped statement that Rhoden made a genuinely self-inculpatory statement, admitting to his role in the incident that resulted in Foster's death

and making him criminally accountable for that homicide. The genuineness of these inculpatory admissions, and thus their corresponding reliability, is gleaned from Rhoden's recitation that all that he and the others ever intended was to scare the Gangster Disciples, not to kill anyone. While Petitioner acknowledges this Court's concern that a major problem infecting the reliability of a non-testifying codefendant's statement is the declarant's motive to curry favor with the prosecution thereby leading the declarant to implicate a defendant while exonerating himself (*Lee*, 106 S.Ct. at 2062), this concern is noticeably absent here. Unlike in *Lee*, and in *Lilly*, that fear is absent here because the taped statement itself depicts that Rhoden never made an effort to exonerate himself from criminal responsibility, to shift the blame of the shooting from himself to Respondent, or otherwise to implicate Respondent to any greater extent. (See Rhoden's statement). That Rhoden's statement detailed the conduct of the other two participants is but a byproduct of his recounting of the entire incident. That Rhoden named Respondent as the shooter is a fact, a fact that is accurate and truthful. Unlike *Lilly*, that Rhoden's statement to police was accurate and truthful when given is further substantiated by the statement of codefendant Jamison, which was admitted at Respondent's trial through the testimony of Jamison, in which Jamison corroborated Rhoden's statement on all material points, including that Respondent was the one who fired the gun. (R. 478-90). Compare, *Lee*, 106 S.Ct. 2064-65.

Under these circumstances, particular and adequate "guarantees of trustworthiness" were adduced which established the existence of the requisite sufficient in-

dicia of reliability needed to rebut the presumptive unreliability of the codefendant's statement which implicated Respondent. This case is distinguishable from *Lilly*, as pointed out throughout Petitioner's petition. Respondent's rights under the Confrontation Clause of the Sixth Amendment were not violated by the admission of the non-testifying codefendant's hearsay statement at Respondent's trial.[1] Accordingly, Petitioner requests that this Court grant them *certiorari* to review the Confrontation Clause issue addressing the admissibility of a non-testifying codefendant's statement and to definitively rule that a genuinely self-inculpatory statement of a non-testifying codefendant implicating a defendant can possess sufficient guarantees of trustworthiness to satisfy the constitutional requirement that such a hearsay statement possess adequate indicia of reliability to be admissible at a defendant's trial.

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[1] Petitioner is aware that this Court has ruled that Confrontation Clause errors are subject to a harmless error analysis. *Cruz*, 107 S.Ct. at 1719; *Wright*, 110 S.Ct. at 3151; *Lilly*, 119 S.Ct. at 1901. The Illinois Appellate Court conducted a Confrontation Clause harmless error analysis, concluding that the error was not harmless. (App. B. at 27-28). Petitioner contends that, since the Illinois Appellate Court already has considered the harmless error issue in the first instance, this Court may now review the propriety of that determination by the Illinois Appellate Court. See, *Lilly*, 119 S.Ct. at 1901. Petitioner maintains that the Illinois Appellate Court's harmless error ruling is erroneous and should be reversed.

CONCLUSION

For the reasons and arguments stated herein, Petitioner respectfully requests that a writ of *certiorari* issue to the Illinois Appellate Court, Third Judicial District, to review that court's decision which reversed the trial judge's determination that the statement of the non-testifying codefendant, Derrick Rhoden, which contained adequate guarantees of trustworthiness, was substantively admissible at Respondent's trial notwithstanding Respondent's inability to cross-examine the out-of-court declarant.

Respectfully submitted,

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APPENDIX A

[Dated July 21, 1999]

No. 3-98-0472

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 1999

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

NASHAUN B. QUICK,

Defendant-Appellee.

Appeal from the Circuit Court of the 14th
Judicial Circuit Rock Island County, Illinois, No. 97-CF-556
Honorable J. Donald O'Shea, Judge Presiding.

ORDER

NOT TO BE PUBLISHED

The defendant, Nashaun Quick, was convicted by a jury of first degree murder (720 ILCS 5/9-1(a)(3) (West 1996)) and was sentenced to natural life in prison without the possibility of parole. On appeal, he contends that: (1) the trial court erred in allowing the statements of his co-defendants to be used at trial; (2) the trial court erred in failing to grant him a new trial as a sanction against the State for its failure to comply with discovery rules; (3)

the trial court erred in failing to grant him a new trial because a key witness altered her testimony in the co-defendant's trial; (4) the State failed to prove the defendant's guilt beyond a reasonable doubt; and (5) the trial court abused its discretion in sentencing the defendant to natural life in prison. For the reasons that follow, we affirm the defendant's conviction but modify his sentence.

FACTS

Derrick Rhoden, Jeremiah Jamison, and the nineteen-year-old defendant were accused of participating in the June 11, 1997, murder of Paul Foster. Rhoden and Jamison were given immunity in exchange for their testimony in the defendant's case.

Jamison told police that he, along with Rhoden and the defendant, had been involved in a fight with members of the Gangster Disciples on the day of the murder, and that the three of them returned to the victim's home later that night to scare members of the gang. Once there, they decided to shoot at the victim's house. Jamison told police that the defendant was the shooter.

Rhoden gave a similar statement to the police. He specified that the defendant began shooting at the victim's house while standing on a sidewalk at the west side of the house. According to Rhoden, the defendant shot a nine millimeter black gun five or six times into the front of the house as he walked east.

Rhoden's account was corroborated by the evidence. Numerous bullet holes were found in the front (south side) of the house and 11 spent nine millimeter shell

casings were discovered in that location. In addition, a nine millimeter slug was recovered from the victim's body which was found in a bedroom in the southwest corner of the house.

The victim's girlfriend, Mae MacQuieter, testified that she was sleeping on a couch in the victim's home at about 1:30 a.m. on June 11, 1997, when she was awakened by several gunshots. When the shots stopped, she went into the bedroom and found the victim on the floor with blood on his chest. The victim died as a result of the shooting.

Jamison, despite his grant of immunity, denied at trial the information he had related to the police and testified that he had not participated in the crime. Rhoden refused to answer any questions at trial. Over the defendant's objections, Jamison's pre-trial statement and the referenced portion of Rhoden's were admitted into evidence.

Officer Harder of the Rock Island police department testified that he responded to a report of a fight near the victim's residence on the afternoon of the day preceding the shooting. He observed the defendant with a bloodied lip and "in a fit of rage."

The defendant theorized at trial that a Charles Davis and members of Davis' gang committed the murder due to a dispute with the victim over the selling of drugs from the victim's house. This theory was based, at least in part, upon a discussion his counsel had prior to trial with Officer Poulos of the Rock Island police department. A memo (the Poulos memo), prepared by Poulos prior to this meeting, was not provided to counsel until the third day of trial.

At their meeting, Poulos informed counsel that the victim had met with him the day of the murder. The victim told Poulos that he feared for his life because he was being threatened by Charles Davis. The actual Poulos memo revealed also that a confidential informant had reported to Officer Poulos that a woman named Mary Fender had told him that Charles Davis and Terrance Brannigan committed the murder.

Upon receiving the Poulos memo, the defendant claimed surprise and moved for a mistrial. The court denied the motion, but granted the defendant a two-week continuance. As an additional sanction, the court allowed the memo to be introduced by the defense as evidence.

When the trial resumed, the defendant called a number of witnesses, including three alibi witnesses. In addition, a neighbor of the victim testified that the victim was concerned about activity near his home, and a police officer testified that there was a lot of drug dealing in the area surrounding the victim's home.

The defendant also called Charles Davis to the stand. Davis denied being involved in the murder of the victim, but admitted that he was involved in a fight near the victim's residence on the afternoon of the murder. Mary Fender also testified, and denied ever saying that Davis and Brannigan committed the murder.

At the close of the case, the jury found the defendant guilty of first degree murder. About two weeks after trial, defense counsel was advised by the State that there were other interviews, documents, and memos that were inadvertently not disclosed. After the documents in question were revealed to the defendant, he filed motions for judg-

ment notwithstanding the verdict and for a new trial. The court denied the motions.

The defendant was sentenced to natural life in prison and this appeal followed.

ANALYSIS

I. Admissibility of Co-Defendant's Statements

The defendant argues that the court erred when it allowed Rhoden's statement to be used a trial. The defendant contends that Rhoden's statement was unreliable, and should have been inadmissible.[1] We disagree.

Section 115-10.2 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.2 (West 1996)) provides for the admissibility of a statement when a witness refuses to testify despite a court order to do so. In such instance, the rule provides that a prior statement of the witness bearing sufficient guarantees of trustworthiness can be admitted into evidence if the court determines that the statement is offered as evidence of a material fact, it is more probative of that fact than any other evidence which the proponent can procure through reasonable efforts, and the interests of justice are best served by the

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[1] In setting forth his general issue on appeal, the defendant challenges both Jamison's and Rhoden's statements. However, in his written and oral arguments the defendant addressed only the admissibility of Rhoden's statement. Therefore, we will not consider the admissibility of Jamison's statement. See *People v. McCarthy*, 213 Ill.App.3d 873, 885, 572 N.E.2d 1219, 1226 (1991) (mere contentions without argument or citation to authority do not merit consideration on appeal).

admission of the evidence. 725 ILCS 5/115-10.2 (West 1996).

In the instant action, Rhoden was given immunity and the court ordered him to testify. He refused to do so, and was therefore "unavailable" within the meaning of Section 5/115-10.2(c) of the Code. 725 ILCS 5/115-10.2(c) (West 1996)

Rhoden's prior statement to the police was admitted to show the type of gun that was used to commit the murder, as well as the location from where the shots were fired. The statement bore sufficient indicia of reliability because Rhoden incriminated himself in the statement, and the statement was consistent with Jamison's statement and the physical evidence.

Rhoden's statement was material evidence in the case because it placed the gun in the defendant's hand, described the method of the murder, and explained the type of gun that was used. His statement was the most detailed eyewitness report of the circumstances that gave rise to the victim's death. Therefore, the interests of justice were served by allowing this probative evidence to be used at trial. Accordingly, we find that the trial judge did not err in allowing Rhoden's statement to be admitted into evidence.

II. Discovery Violations

The defendant next argues that the court should have granted him a new trial because the State failed to disclose a number of documents that were material to his case. In addition to the Poulos memo served upon the

defendant the third day of trial, the State disclosed a number of other documents relating to the case after the jury returned its guilty verdict.

One such document was labeled "Rock Island Police Department Interoffice Correspondence" and dated June 13, 1997. This report indicated that a neighbor of the victim told the police that there was drug activity in the neighborhood. The neighbor also corroborated that a fight occurred on the day of the murder between two rival gangs.

Other interoffice correspondence, also dated June 13, 1997, reported a tip from a concerned citizen who had been told that a "cousin to the Lee's shot Paul Foster." Two other documents disclosed that Danny Babers saw a group of people in the victim's home at about 11:45 p.m. on the evening of the murder. One of these people carried a .22 caliber gun, and another went by the name of "Cool," the nickname of Charles Davis.

An undisclosed crime stoppers' report dated June 12, 1997, stated that an anonymous caller reported that a co-worker told him that a person named "Dinky," who sold drugs in front of the victim's residence, murdered a male in Rock Island that week. The report states that either Darren Chandler or Edward Rhoden used the alias of "Dinky." A crime tip informant sheet mentioned "Dinky" and "Terrance" as people who may have been involved in the murder.

The State does not argue that the reports were exempt from discovery. Rather, it contends that the defendant has failed to show that the documents were material. The defendant does not accuse the State of acting in bad

faith, but contends that the undisclosed evidence was material and that he was prejudiced by the State's failure to make timely disclosures. He argues that he would have changed his trial strategy, at least in part, had these documents been disclosed before trial. For instance, in addition to Davis and Brannigan, he may have tried to also point the blame toward "Dinky", Edward Rhoden, or a cousin of Lee who are all mentioned as the possible murderer in at least one of the undisclosed reports.

The standard of review for a discovery sanction is whether the trial court abused its discretion. *People v. Matthews*, 299 Ill.App.3d 914, 918, 702 N.E.2d 291, 294 (1998). The government has an affirmative duty to disclose evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-1197.

To establish a violation, suppressed evidence must be both favorable to the accused and material. *People v. Hobley*, 182 Ill.2d 404, 432-433, 696 N.E.2d 313, 328 (1998). Favorable evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *Hobley*, 182 Ill.2d at 432-433, 696 N.E.2d at 328. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome of a case. *Hobley*, 182 Ill.2d at 433, 696 N.E.2d at 328.

Initially, we note that the court imposed reasonable sanctions for the State's tardy disclosure of the Poulos memo. Permitting the defendant to introduce the memo into evidence allowed the defendant to bolster its theory of the case in a way it could not have done without the violation. The court also properly granted the defendant a continuance.

With respect to the post-trial disclosures by the State, the trial judge analyzed the materiality of each of the documents in a series of detailed written opinions. The court found most troubling, as do we, the undisclosed reports pertaining to Danny Babers' claims that while purchasing cocaine from the victim at 11:45 p.m., he observed four other black males, including one by the name of "Cool" and one with a gun at the victim's home. Clearly, the failure to disclose this evidence constituted a serious discovery violation, and deprived the defendant of the opportunity to call Babers as a witness to bolster his theory that Charles Davis and his associates were the responsible parties. Even so, we cannot find any reasonable probability that the outcome of the proceeding would have been different had the defendant received the benefit of Babers' testimony. In the first place, there is a serious questions as to the credibility of Babers. In his statement to Detective Sullivan, Babers admitted that he wasn't sure whether he was at the victim's house the night of the murder or the previous night and admitted to being under the combined influence of alcohol and cocaine at the time. Moreover, even allowing that Charles Davis may have been in the victim's house at 11:45 p.m. in the company of a companion armed with a .22 caliber gun, it does not logically follow that he was

responsible for a shooting that occurred at 1:30 a.m. from outside the house with a nine millimeter gun.

Due to the substantial evidence of the defendant's guilt and a lack of showing of materiality of the undisclosed evidence, we do not believe that the outcome of the proceeding would have been different if the undisclosed evidence had been presented to the jury. Accordingly, we find that the trial court did not abuse its discretion in denying the defendant's request for a new trial based on the State's discovery violations.

III. Altered Testimony of State's Witness

The defendant contends that the victim's girlfriend, Mae MacQuieter, substantially changed her testimony when called by the State to testify at co-defendant Rhoden's subsequent trial. Therefore, the defendant argues that the trial court should have granted his motion for a new trial on that basis.

To warrant a new trial based on newly discovered evidence, the evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could have not been discovered sooner through the exercise of due diligence. *People v. Smith*, 177 Ill.2d 53, 82, 685 N.E.2d 880, 892 (1997). Here, the defendant has failed to show, *inter alia*, his exercise of due diligence.

At the defendant's trial, MacQuieter testified that only she and the victim were in the house at the time of the

shooting. She also testified that when she and the victim arrived at the house around 9:30 p.m., it did not appear that anyone else had been there. A careful review of the record in this case reveals that MacQuieter never said, nor was she asked on either direct or cross-examination, whether prior to the shooting there were any visitors after she and the defendant arrived home at 9:30 p.m.

According to the defendant, he has "learned from various sources" that during Rhoden's trial, MacQuieter testified that approximately 20 minutes before the shooting, an individual came to the victim's house on the night in question, and that she heard the victim and this other individual speaking in a loud voice. Aside from the fact that the defendant has failed to include in the record on appeal the relevant portion of the transcript from Rhoden's trial, we find his contention to be without merit. See Supreme Court Rule 323(a) (134 Ill.2d R. 323 (a)) (the report of proceedings shall include all the evidence pertinent to the issues on appeal).

The report of MacQuieter's pre-trial statement, which was disclosed to the defendant prior to trial, included her statement that: "[T]hey know I was in the house!" Such a declaration by MacQuieter should have alerted defense counsel to the possibility of some interaction between the victim and assailants prior to the shooting. Therefore, his contention that he did not have any reason to ask about such a possibility during his cross-examination of MacQuieter is not compelling. He also makes no claim that he attempted to interview MacQuieter before trial to ascertain the circumstances surrounding the shooting. Accordingly, we conclude that defendant failed to exercise due diligence in discovering the matter about which

he now complains, and the trial court did not abuse its discretion in denying his motion for new trial on this ground.

IV. Sufficiency of the Evidence

The defendant next contends that the State failed to prove him guilty of first degree murder beyond a reasonable doubt. The standard of review for such contention is whether, after viewing the evidence in the light most favorable to the State, any rationale trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill.2d 237, 261, 478 N.E.2d 267, 277 (1988).

The defendant argues that the verdict is not supported by the evidence because the State presented no unbiased third party witness, the defendant did not confess, and there was no physical evidence linking the defendant to the crime. Our review of the evidence, however, in the light most favorable to the State, leads us to conclude that it was sufficient to prove the defendant's guilt beyond a reasonable doubt. The statements of Jamison and Rhoden implicating the defendant were consistent with each other and with the physical evidence in the case, including Rhoden's accurate description of the type of weapon used in the commission of the crime and the defendant's location when he fired the shots into the house. Furthermore, Officer Harder confirmed that the defendant was involved in a fight outside the victim's residence the afternoon before the shooting. This evidence was sufficient to support the defendant's conviction.

V. Imposition of Sentence

The defendant argues that the trial judge erred in imposing a sentence of natural life. He contends that the trial court imposed the sentence under section 9-1(b)(6) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(b)(6) (West 1996)). That section, when read in conjunction with section 5-8-1(a)(1)(b) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-8-1(a)(1)(b) (West 1996)) authorizes a natural life sentence for first degree murder when the victim was killed by the defendant in the course of another felony. Since the "other felony" in this instance, aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 1996)), is not one of the felonies enumerated in section 9-1(b)(6), the defendant maintains that the court erred in imposing the natural life sentence. In response, the State argues that the sentence was not imposed pursuant to these provisions, but rather pursuant to the alternative provisions of section 5-8-1(a)(1)(b) of the Corrections Code, which authorizes the imposition of a natural life sentence when the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

Sentencing is a matter of judicial discretion and absent an abuse of that discretion by the trial court, a sentence may not be altered on review. *People v. Solano*, 221 Ill. App.3d 272, 273, 581 N.E.2d 889, 890-91 (1991).

At the sentencing hearing, the assistant state's attorney, after reviewing the defendant's criminal history and other statutory factors in aggravation, recommended a prison sentence in the range of 45 to 55 years. Defense

counsel, noting the defendant's youth and rehabilitative potential, proposed a sentence of 25 to 30 years.

The trial judge noted that the standard range for first degree murder is 20 to 60 years, and that the extended term range is 60 to 100 years. See 730 ILCS 5/5-8-1 (a)(1)(a), 5/5-8-2(a)(1) (West 1996). After finding that the defendant was not eligible for an extended term, he sentenced the defendant to a term of natural life. In so doing, we hold the court abused its discretion.

A defendant convicted of first degree murder may be sentenced to natural life imprisonment:

> "if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, * * * that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present * * *. 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

Since the crime of aggravated discharge of a firearm, which is the predicate felony of the defendant's felony murder conviction, is not one of the felonies enumerated in section 9-1(b)(6)(c) of the Criminal Code, he could be sentenced to natural life in this case only if the court found that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Here, the court made no such express finding. Moreover, the court specifically found that the defendant was not eligible for an extended term sentence.

Section 5-5-3.2(b)(2) of the Corrections Code provides that a court may impose an extended term sentence, *inter alia*:

> "when a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty[.]" 730 ILCS 5/5-5-3.2(b)(2) (West 1996).

Accordingly, the defendant could not possibly be *ineligible* for an extended term sentence, and the same time be *eligible* for a natural life sentence for his particular crime. Therefore, the maximum sentence allowable was 60 years. Because we defer to the trial court's other findings, including the defendant's criminal history, the crime's relationship to organized gang activities, and the need to deter others from committing such a horrific crime, we modify the defendant's natural life sentence to the maximum allowable term of imprisonment, 60 years, pursuant to Supreme Court Rule 615(b)(4) (134 Ill.2d R. 615(b)(4)).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed as modified.

Affirmed as modified.

HOMER, J., with HOLDRIDGE, P.J., and SLATER, J., concurring.

APPENDIX B

[Dated December 7, 1999]

No. 3-98-0472

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 1999

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

NASHAUN B. QUICK,

Defendant-Appellant.

Appeal from the Circuit Court of the 14th
Judicial Circuit Rock Island County, Illinois, No. 97-CF-556
Honorable J. Donald O'Shea, Judge Presiding.

Justice Homer delivered the opinion of this court:

Publ. In Full

The defendant, Nashaun Quick, was convicted by a jury of first degree murder (720 ILCS 5/9-1(a)(3) (West 1996)) and was sentenced to natural life in prison without the possibility of parole. On appeal, he contends that: (1) the trial court erred in allowing the statements of his alleged accomplices to be used at trial; (2) the State failed to prove the defendant's guilt beyond a reasonable doubt; (3) the trial court erred in failing to grant him a new trial

because a key witness altered her testimony in the trial of an accomplice; (4) the trial court erred in failing to grant him a new trial as a sanction against the State for its failure to comply with discovery rules; and (5) the trial court abused its discretion in sentencing the defendant to natural life in prison. For the reasons that follow, we reverse the defendant's conviction and remand this cause for a new trial.

FACTS

Derrick Rhoden, Jeremiah Jamison, and the 19-year-old defendant were accused of participating in the June 11, 1997, murder of Paul Foster. Rhoden and Jamison were given immunity in exchange for their testimony in the defendant's case.

Jamison told police in a tape-recorded statement that he, along with Rhoden and the defendant, had been involved in a fight with members of the Gangster Disciples on the day of the murder, and that the three of them returned to the victim's home later that night to scare members of the gang. Once there, they decided to shoot at the victim's house. Jamison told police that the defendant was the shooter.

Rhoden gave a similar taped statement to the police. He specified that the defendant began shooting at the victim's house while standing on a sidewalk near the front of the house. According to Rhoden, the defendant shot a 9-millimeter black gun five or six times into the front of the house as he walked east.

In fact, numerous bullet holes were found in the front (south side) of the house and 11 spent 9-millimeter shell

casings were discovered in that location. In addition, a 9-millimeter slug was recovered from the victim's body which was found in a bedroom in the southwest corner of the house.

The victim's girlfriend, Mae MacQuieter, testified that she was sleeping on a couch in the victim's home at about 1:30 a.m. on June 11, 1997, when she was awakened by several gunshots. When the shots stopped, she went into the bedroom and found the victim on the floor with blood on his chest. The victim died as a result of the shooting.

After receiving grants of immunity, Jamison and Rhoden were called to testify for the State. At trial, Jamison recanted the statement he had given to the police and testified that he had not participated in the crime. Rhoden refused to answer any questions at trial. Over the defendant's objections, Jamison's taped statement and the referenced portion of Rhoden's were admitted into evidence.

Officer Harder of the Rock Island police department testified that he responded to a report of a fight near the victim's residence on the afternoon of the day preceding the shooting. He observed the defendant with a bloodied lip and "in a fit of rage."

The defendant theorized at trial that a Charles Davis and members of Davis' gang committed the murder due to a dispute with the victim over the selling of drugs from the victim's house. This theory was based, at least in part, upon a discussion his counsel had prior to trial with Officer Poulos of the Rock Island police department. A memo (the Poulos memo), prepared by Poulos prior to this meeting, was not provided to counsel until the third day of trial.

At their meeting, Poulos informed counsel that the victim had met with him the day of the murder. The victim told Poulos that he feared for his life because he was being threatened by Charles Davis. The actual Poulos memo revealed also that a confidential informant had reported to Officer Poulos that a woman named Mary Fender had told him that Charles Davis and Terrance Brannigan committed the murder.

Upon receiving the Poulos memo, the defendant claimed surprise and moved for a mistrial. The court denied the motion, but granted the defendant a two-week continuance. As an additional sanction, the court allowed the memo to be introduced by the defense as evidence.

When the trial resumed, the defendant called a number of witnesses, including three alibi witnesses. In addition, a neighbor of the victim testified that the victim was concerned about activity near his home, and a police officer testified that there was a lot of drug dealing in the area surrounding the victim's home.

The defendant also called Charles Davis to the stand. Davis denied being involved in the murder of the victim, but admitted that he was involved in a fight near the victim's residence on the afternoon of the murder. Mary Fender also testified and denied ever saying that Davis and Brannigan committed the murder.

At the close of the case, the jury found the defendant guilty of first degree murder. About two weeks after trial, defense counsel was advised by the State that there were other interviews, documents, and memos that were inadvertently not disclosed. After the documents in question were revealed to the defendant, he filed motions for

judgment notwithstanding the verdict and for a new trial. The court denied the motions.

The defendant was sentenced to natural life in prison and this appeal followed.

ANALYSIS

I. Admissibility of Accomplices' Statements

We first consider the defendant's contention that the trial court erred in allowing the State to introduce portions of Rhoden's taped statement.[1] The defendant argues that he was denied a fair trial because (1) the statement lacked sufficient indicia of reliability to qualify for admission under section 115-10.2 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.2 (West 1998)), and (2) the admission of the statement violated his constitutional right to confront witnesses against him (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8). These are interrelated issues.

In 1996, the Illinois General Assembly addressed the issue of the admissibility of extrajudicial statements of reluctant witnesses in criminal cases. The resulting leg-

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[1] In setting forth his general issue on appeal, the defendant challenges both Jamison's and Rhoden's statements. However, in his written and oral arguments the defendant addressed only the admissibility of Rhoden's statement. Therefore, we will not consider the admissibility of Jamison's statement. See *People v. McCarthy*, 213 Ill.App.3d 873, 885, 572 N.E.2d 1219, 1226 (1991) (mere contentions without argument or citation to authority do not merit consideration on appeal).

islation, contained in section 115-10.2 of the Code, provides in relevant part as follows:

> "(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:
>
> (1) the statement is offered as evidence of a material fact; and
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts[.] * * *
>
> * * *
>
> (c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." 725 ILCS 5/115-10.2 (West 1998).

The provisions of section 115-10.2 were included in the first conference committee report to House Bill 1249. During floor debate, Representative Durkin explained:

> "[T]hrough this Amendment, we have adopted the federal rule of evidence, particularly, 804(b)5 [Fed.R.Evid. 804(b)(5) (transferred to Fed.R.Evid. 807).], which is commonly known as the residual hearsay exception. The federal rule has been in place for approximately 20 years, which specifically it [*sic*] states that certain statements by witnesses will be admitted as substantive evidence in a state's case in chief, despite the fact

> that there has been no confrontation if there are individual guarantees of trustworthiness." 89th Ill. Gen. Assem., House Proceedings, May 24, 1996, at 5 (statements of Representative Durkin).

In the instant action, Rhoden was "unavailable" within the meaning of section 115-10.2(c) of the Code (725 ILCS 5/115-10.2(c) (West 1996)), because after he was granted immunity in exchange for his testimony, he refused to testify. Further, Rhoden's statement was offered as evidence of material facts in that it described the shooting, placed the gun in the defendant's hand, and specified the type of gun that was used to commit the murder. See 725 ILCS 5/115-10.2(a)(1) (West 1996). His statement was also the most probative evidence of the defendant's guilt because it was the most detailed eyewitness report of the circumstances that gave rise to the victim's death. See 725 ILCS 5/115-10.2(a)(2) (West 1996).

However, in order for Rhoden's hearsay statement to be admissible, it must also be found to possess sufficient "circumstantial guarantees of trustworthiness." 725 ILCS 5/115-10.2 (West 1998). Our analysis in this regard must begin and end with an examination of the defendant's rights under the confrontation clause.

The confrontation clause guarantees a defendant the right to confront his accusers and ensures the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding. *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678, 110 S.Ct. 3157, 3163 (1990). The confrontation clause prohibits the admission of the declarant's hearsay statement inculpating the defendant unless it can be shown that (1) the declarant is unavailable, and (2) his statement bears

adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608, 100 S.Ct. 2531, 2539 (1980). Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66, 65 L.Ed.2d at 608, 100 S.Ct. at 2539.

We first consider whether Rhoden's statement was admitted pursuant to a "firmly rooted hearsay exception." While the hearsay exception for statements against pecuniary interest is rooted in the English common law, the practice by which the government seeks to introduce the confession of an accomplice which incriminates the accused is "of quite recent vintage." *Lilly v. Virginia*, 527 U.S. ___, ___, 144 L. Ed. 2d 117, 130-31, 119 S.Ct. 1887, 1897 (1999).

In *Lilly*, the defendant and two accomplices, including his brother, were arrested following a two-day crime spree during which they abducted a victim, who was later shot and killed. The defendant's brother admitted to police that he stole some alcoholic beverages, but he claimed that the defendant committed the murder. When the State called the brother to testify at the defendant's trial, he invoked his fifth amendment privilege against self-incrimination. The trial court then admitted the brother's extrajudicial statements as declarations of an unavailable witness against penal interest. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 125, 119 S.Ct. at 1892-93.

In affirming the defendant's convictions, the Virginia Supreme Court held that the confrontation clause was satisfied because the brother's statement fell within a

firmly rooted exception to the hearsay rule. Further, the Virginia court declared that the brother's statements were otherwise reliable because he knew that he was implicating himself as a participant in several crimes and because the evidence was independently corroborated by other evidence at trial. See *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 125, 119 S.Ct. at 1893.

However, the United States Supreme Court reversed, holding that an accomplice's confession that inculpates a criminal defendant is not within a firmly rooted exception to the hearsay rule as that rule has been defined by the confrontation clause. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 133, 119 S.Ct. at 1899. The Supreme Court also rejected the notion that the brother's statements were otherwise reliable, noting that the brother had a natural motive to exculpate himself and that his statements were made to the authorities while he was in custody, suspected of criminal misconduct, and under the influence of alcohol. The Court also remarked that the brother's statements were made in response to leading questions posed by the authorities. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 133, 119 S.Ct. at 1901.

The Supreme Court ruled that to be admissible under the confrontation clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 135, 119 S.Ct. at 1901. An accomplice's statements that shift or spread the blame to a criminal defendant fall outside the realm of hearsay exceptions that are so trustworthy that adversarial testing can be expected to

add little to the statements' reliability. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 132, 119 S.Ct. at 1898.

Notwithstanding these principles of law, the State argues that the circumstances surrounding Rhoden's statement and the nature of the statement itself supplied the necessary inherent trustworthiness. In support, the State maintains that: (a) Rhoden was not a suspect and was not in custody at the time he gave his statement; (b) he made a self-inculpatory statement; (c) he was not under the influence of alcohol or drugs; (d) the questions put to Rhoden by the police were open-ended and not leading; (e) Rhoden and the defendant belonged to the same gang, eliminating any motive to inculpate the defendant; and (f) only after admitting his own responsibility for the murder, 70 minutes after the questioning began, did Rhoden implicate the defendant. We disagree with the State's contention that these factors are sufficient to distinguish the instant case from *Lilly* and establish the inherent trustworthiness of Rhoden's statement.

Although Rhoden may not have been a suspect or in custody when he was first interrogated at the police station, by the time he inculpated the defendant he would have reasonably believed himself to be a suspect in the shooting. While Rhoden admitted to police his own role as an accessory to the crime, he identified the defendant as the shooter. Furthermore, any motivation Rhoden may have had to protect the defendant due to gang affiliation logically provides no more compelling evidence of reliability than the motivation of the brother in *Lilly* to protect that defendant.

The following questions from the police and answers given by Rhoden were read to the jury:

"Q. Okay, when did Nashaun start shooting at Paul's house?

A. When he arrived on the sidewalk.

Q. Okay, did he walk from the west side of Paul's house on the sidewalk, going towards the east, shooting at the house?

A. Yes.

Q. About how many times did he shoot, if you remember?

A. About five or six.

Q. While he was shooting at the house, was he walking along the sidewalk?

A. Yes.

Q. All right, who had the gun?

A. Nashaun Quick.

Q. What caliber gun was it?

A. Nine millimeter.

Q. What color was the gun?

A. Black."

The confession of an accomplice inculpating the accused is presumptively unreliable. *Lee v. Illinois*, 476 U.S. 530, 90 L. Ed. 2d 514, 106 S.Ct. 2056 (1986). Following our careful review, we simply cannot find that Rhoden's hearsay statement possessed sufficient indicia of reliability by virtue of its inherent trustworthiness to justify its admission without the defendant's opportunity for cross-examination.

Because Rhoden's statement was neither admitted pursuant to a firmly rooted hearsay exception nor shown to

contain particularized guarantees of trustworthiness, the court erred in admitting it.

Alternatively, the State argues that even if the admission of Rhoden's statement is considered error, it was harmless error beyond a reasonable doubt. Confrontation clause errors do not automatically warrant reversal, and a defendant's conviction can be affirmed if the court is able to conclude the error was harmless beyond a reasonable doubt. *People v. Johnson*, 116 Ill. 2d 13, 28, 506 N.E.2d 563, 570 (1987).

The State argues that Rhoden's redacted statement was admitted to show only: (1) that a nine-millimeter handgun was used, and (2) that the defendant was walking on the sidewalk near the house as the shooting occurred. The State points out that the type of gun used and the location of the shooter were otherwise established by the physical evidence. Hence, the State contends that Rhoden's statement added little to the case against the defendant.

An examination of the record belies the State's contention. In his statement, Rhoden identified the defendant as the shooter. That 9-millimeter shell casings were found near the sidewalk in front of the house and a 9-millimeter slug was recovered from the victim's body do not prove that it was the defendant who fired the shots. The weapon was not recovered, and aside from Rhoden's statement, there was no other evidence linking the defendant to such a weapon or to the location from which the shots were apparently fired. Further, although Jamison also implicated the defendant as the shooter in his statement to the police, he provided less detail and recanted his statement at trial. Aside from Jamison's

statement, the admissible evidence against the defendant was largely circumstantial. Therefore, we will not consider the admission of Rhoden's statement as harmless error beyond a reasonable doubt.

For the reasons stated, we reverse the defendant's conviction and remand this cause for a new trial.

II. Sufficiency of the Evidence

The defendant further contends that his conviction should be reversed outright, because the State failed to prove him guilty of first degree murder beyond a reasonable doubt. The standard of review for such contention is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985).

The defendant argues that the verdict is not supported by the evidence because the State presented no unbiased third-party witness, the defendant did not confess, and there was no physical evidence linking the defendant to the crime. Our review of the evidence, however, in the light most favorable to the State, leads us to conclude that it was sufficient to prove the defendant's guilt beyond a reasonable doubt. Therefore, double jeopardy principles do not bar the State from proceeding against the defendant in a new trial.

Because we remand this cause for a new trial, we find it unnecessary to address the defendant's remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed and this cause is remanded for a new trial.

Reversed and remanded.

HOLDRIDGE, P.J., and SLATER, J., concur.

APPENDIX C

ILLINOIS SUPREME COURT
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April 5, 2000

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Ottawa, Illinois 61350

No. 88814 – People State of Illinois, petitioner, v. Nashaun B. Quick, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 2000.